SABAH FOREST INDUSTRIES A

v.

INDUSTRIAL COURT MALAYSIA & ANOR

HIGH COURT SABAH AND SARAWAK, KOTA KINABALU B
ABDUL RAHMAN SEBLI JC
[JUDICIAL REVIEW NO: K25-01-2010]
11 APRIL 2010

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application to quash award of Industrial Court - Procedure for challenging an award - Whether ought to be by way of reference to High Court in accordance with s. 33A Industrial Relations Act 1967 and not by way of judicial review under O. 53 Rules of the High Court 1980* C

LABOUR LAW: *Industrial Court - Award - Application to quash - Procedure for challenging an award - Whether ought to be by way of reference to High Court in accordance with s. 33A Industrial Relations Act 1967 and not by way of judicial review under O. 53 Rules of the High Court 1980* D

CIVIL PROCEDURE: *Judicial review - High Court - Mode of proceedings - Application to quash award of Industrial Court - Whether ought to be by way of reference to High Court in accordance with s. 33A Industrial Relations Act 1967 and not by way of judicial review under O. 53 Rules of the High Court 1980* E F

The applicant was granted leave to apply for an order of *certiorari* to quash the decision of the Industrial Court in respect of Award No. 44/2009. At the commencement of the *inter partes* hearing the 2nd respondent raised a preliminary objection on the mode of G proceeding adopted by the applicant, contending that the application ought to have been by way of reference to the High Court in accordance with s. 33A of the Industrial Relations Act 1967 ('IRA') and not by way of judicial review under O. 53 of the Rules of the High Court 1980 ('RHC'). The issue requiring determination was H whether the applicant could disregard the procedure prescribed by the IRA in challenging the Industrial Court award.

I

Held (upholding the preliminary objection, and dismissing the applicant's action with costs):

(1) An aggrieved party's right to choose which mode suits him best cannot depend on whether judicial review is available to him but whether he has the right of choice in the first place. It must be noted that the conditions under s. 33A(1)(a), (b), (c) and (d) of the IRA are conditions that an aggrieved party must fulfil before any question of law qualifies for reference. The applicant in the present case, by applying directly to the High Court for judicial review, was dodging those conditions. This was not a choice open to the applicant. If the law that regulates the procedure for challenging an Industrial Court award prohibits a direct challenge to the High Court, it is scandalous to suggest that the aggrieved party can circumvent that prohibition by adopting a mode which allows him to do so. That is tantamount to allowing the aggrieved party to apply through the back door. Since the mode for challenging the award is prescribed by law *ie*, s. 33A of the IRA, the challenge must be made by this mode and no other. The procedure under O. 53 of the RHC is only permissible if the IRA is silent on the procedure for challenging an award. (paras 16 & 25)

Case(s) referred to:

AMZ Corporation Sdn Bhd v. Sye Ah Chai [1988] 1 LNS 209 HC ***(refd)***

Cheek Hong Leong v. KYM Industries (M) Sdn Bhd [1999] 7 CLJ 317 HC ***(refd)***

Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***

Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***

National Union of Teachers in Independent Schools, West Malaysia v. Han Chiang High School, Penang [1989] 1 CLJ 1091; [1989] 2 CLJ (Rep) 160 HC ***(refd)***

NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 24(2), 30(1), (5), 33A(1), (3), (5), (7) 33B(1)
Interpretation Acts 1948 and 1967, s. 17A
Rules of the High Court 1980, O. 53 rr. 2(1), (4), 4(1), (2), 9

For the applicant - S Vanugopal; M/s S Vanugopal & Partners
For the 1st respondent - Unrepresented
For the 2nd respondent - Yunof Maringking; M/s Maringking & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Rahman Sebli JC:

Brief Background

[1] The applicant was granted leave to apply for an order of *certiorari* to quash the decision of the Industrial Court in respect of Award No. 44/2009 dated December 2009. At the commencement of the *inter partes* hearing counsel for the 2nd respondent raised a preliminary objection on the mode of proceeding adopted by the applicant. It was contended that the application ought to have been by way of reference to the High Court in accordance with s. 33A of the Industrial Relations Act 1967 (the IRA) and not by way of judicial review under O. 53 of the Rules of the High Court 1980 (the RHC). I upheld the preliminary objection and dismissed the applicant's action with costs. These are my grounds for upholding the objection.

Reference Mechanism

[2] The existing mechanism for challenging the award of the Industrial Court is prescribed by s. 33A of the IRA which provides as follows:

> **33A. Reference to the High Court on a question of law**
>
> (1) Where the Court has made an award under section 30 (1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law:

A

(a) which arose in the course of the proceedings;

(b) the determination of which by the Court has affected the award;

(c) which, in the opinion of the Court, is of sufficient
B importance to merit such reference; and

(d) the determination of which by the Court raises, in the opinion of the Court, sufficient doubt to merit such reference.

C (2) Where an application under subsection (1) has been granted by the Court, compliance with the award in respect of which the application has been granted shall be stayed pending the disposal of the reference by the High Court, unless the Court otherwise directs in respect of the whole or a part of the
D award.

(3) An application under this section shall be made within thirty days of the date on which the award was made.

(4) Where a question has been referred to the High Court under this section, the Court shall forward the record of proceedings
E to the Registrar of the High Court who shall thereupon appoint and notify to the parties to the proceedings the time and place for its hearing.

(5) The High Court shall hear and determine the question
F referred to it under this section as if the reference were an appeal to the High Court against the award of the Court, and may, consequently, confirm, vary, substitute or quash the award, or make such other order as it considers just or necessary.

G (6) A decision of the High Court under subsection (5) shall have the same force and effect as an award of the High Court under section 32, and may be enforced as if it were an award of the Court.

(7) A decision of the High Court under subsection (5) shall be
H final and conclusive, and no such decision shall be challenged, appealed against, reviewed, quashed or called in question in any other court or before any other authority, judicial or otherwise, whatsoever.

I

Prescribed Law To Challenge Award

[3] The procedure under s. 33A of the IRA is the procedure prescribed by law for challenging the award made by the Industrial Court pursuant to s. 30(1) of the IRA. There is no provision in the IRA that provides for an alternative mode of challenging the award. In the present case it is undisputed that the applicant did not and never had the intention to follow the prescribed procedure. The question is whether the applicant can disregard s. 33A of the IRA and proceed to challenge the award by way of judicial review.

Applicant's Argument

[4] The anchor sheet of the applicant's argument is that it is for the aggrieved party to choose whether to go by way of reference under s. 33A of the IRA or to bypass the provision altogether and go directly to the High Court by way of judicial review in accordance with the procedure laid down by O. 53 of the RHC. In other words the aggrieved party decides which law he wants to follow.

[5] I enquired from counsel if he had any authority to support such proposition and he could not come up with any except to say that many cases under the IRA have been decided by way of judicial review. The following authorities were cited by counsel in his submissions: *Cheek Hong Leong v. KYM Industries (M) Sdn Bhd* [1999] 7 CLJ 317; *National Union of Teachers in Independent Schools, West Malaysia v. Han Chiang High School, Penang* [1989] 1 CLJ 1091; ([1989] 2 CLJ (Rep) 160), *AMZ Corporation Sdn Bhd v. Sye Ah Chai* [1988] 1 LNS 209; *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers' Union* [1995] 2 CLJ 748; *Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183.

[6] Counsel however candidly admitted that the cases cited including the decisions of the apex court are not decisions on s. 33A of the IRA. They are therefore of no assistance in determining the issue. Counsel seems to place particular importance on the judgment of Abdul Malek J (as he then was) in *AMZ Corporation Sdn Bhd*. According to counsel the decision in that case illustrates the point that the challenge to the Industrial Court award can be made either by way of reference or by way of judicial review.

With due respect there is nothing in the judgment to support this argument. The court in that case was dealing with the merits of the application for *certiorari* and not with the question of whether the aggrieved party can bypass s. 33A of the IRA. The issue was simply not before the court. It is true that the court did refer to s. 33A of the IRA but that was for the purpose of showing that the applicant had come to court with 'unclean' hands as it did not disclose the fact that it had made a reference under s. 33A of the IRA before applying for judicial review. The case is not authority for saying that the challenge to the Industrial Court award can be made by way of judicial review.

Reference Procedure

[7] A party aggrieved by the Industrial Court award has the right to challenge the award by applying for reference on points of law. This right is provided by s. 33A(1) of the IRA. On such application the Industrial Court has the discretion whether to grant or to refuse the application. But if no party to the proceedings applies for reference the Industrial Court has no discretion to refer any question of law to the High Court. It is therefore imperative for the aggrieved party to make the application so that his grievance can be determined by the High Court in accordance with s. 33A(5) of the IRA.

[8] The discretion vested in the Industrial Court by s. 33A(1) of the IRA is a discretion that is to be exercised judiciously. It is not an absolute and unfettered discretion. As Eusoff Chin J (as he then was) said in *National Union of Teachers in Independent Schools, West Malaysia* at p. 1093 (p. 162):

> In exercising its power to refer or not to refer a question to the High Court, the Industrial Court will have to do so judiciously.

[9] What happens if the Industrial Court refuses to refer the points of law to the High Court? Does s. 33B(1) of the IRA stand in the way of the aggrieved party? Section 33B(1) provides as follows:

> Subject to this Act and the provisions of section 33A, an award, decision or order of the Court made under this Act (including the decision of the Court whether to grant or not to grant an application under section 33A(1)) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

[10] Ouster clauses such as s. 33B(1) of the IRA have been the subject of numerous judicial pronouncements, some by the Privy Council. For purposes of this judgment suffice it if I refer to the landmark decision of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd* where Gopal Sri Ram JCA (as he then was) after reviewing the authorities on jurisdictional and non jurisdictional errors held as follows at p. 765:

> In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 CLJ 619), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or take into account irrelevant considerations or omits to take into account relevant considerations (what may be termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, **its decision will not be immunized from judicial review by an ouster clause however widely drafted.** (emphasis added)

[11] What it means is that if the decision of an inferior tribunal is tainted by an error of law it is liable to be quashed. Thus, notwithstanding s. 33B(1) of the IRA the decision of the Industrial Court in refusing or allowing reference is liable to be quashed if the decision is erroneous in law. A party aggrieved by the decision is at liberty to apply for judicial review to quash the decision. This was exactly what the aggrieved parties in *Cheek Hong Leong and National Union of Teachers in Independent Schools, West Malaysia* did. What the aggrieved party cannot do however is to ignore s. 33A(1) of the IRA and move on as if the section does not exist.

A **Act Provides Same Remedy**

[12] By virtue of s. 33A(5) of the IRA, a reference under s. 33A(1) is deemed to be an appeal against the award of the Industrial Court. The High Court is given wide powers on hearing such reference, B wider in fact than the powers given to the High Court in a judicial review application. Other than empowering the court to quash the award, which is the same remedy that the applicant is now seeking by way of judicial review, the court is empowered to confirm, vary, substitute or make such other order as it considers just or necessary.

C **[13]** It was submitted however that since the applicant's grievance against the award is not only on points of law but also on points of fact the procedure prescribed by s. 33A of the IRA does not suit the applicant's purpose as the applicant is also raising points of fact. Counsel further submitted that there are differences in the D requirements to be fulfilled by the applicant in a proceeding under s. 33A of the IRA and in a judicial review under O. 53 of the RHC. I am in total agreement with counsel on the second point. But it does not answer the question whether the applicant can ignore s. 33A of the IRA.

E **[14]** As for the first point it is not entirely correct to say that points of fact can be raised in a judicial review application. The judicial review process, like a reference under s. 33A of the IRA is also confined to questions of law except in exceptional cases F because fact finding which includes hearing the witnesses giving oral evidence is within the province of the Industrial Court. As has often been said judicial review is concerned, not with the decision, but with the decision-making process.

G **[15]** The fact that the procedure under s. 33A of the IRA does not allow points of fact to be raised does not give the applicant the right to disregard it, in preference to a procedure that allows it to raise both points of law and fact. The applicant has to contend with what the law requires.

H **[16]** The aggrieved party's right to choose which mode suits him best cannot depend on whether judicial review is available to him but whether he has the right of choice in the first place. It must be noted that the conditions under s. 33A(1)(a), (b), (c) and (d) of the IRA are conditions that an aggrieved party must fulfill before I any question of law qualifies for reference. By applying directly to

the High Court for judicial review what the applicant in the present case is doing is to dodge those conditions. In my judgment this is not a choice open to the applicant. If the law that regulates the procedure for challenging the Industrial Court award prohibits direct challenge to the High Court, it is scandalous to suggest that the aggrieved party can circumvent that prohibition by adopting a mode that allows him to do so. That is tantamount to allowing the aggrieved party to apply through the back door.

Object Of The Act

[17] The object of Parliament in enacting the IRA, is encapsulated in the preamble to the Act which reads as follows:

> An Act to promote and maintain industrial harmony and to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.

[18] In his comments on the object of the IRA Gopal Sri Ram JCA in *Syarikat Kenderaan Melayu Kelantan Bhd* said this at p. 758:

> It is beyond doubt that the Act is a piece of beneficient social legislation by which Parliament intends the prevention and peaceful and speedy resolution of disputes between employers and their workmen. In other words, the object of Parliament in enacting the law is to promote industrial harmony.

[19] There is no ambiguity in s. 33A of the IRA. The intention clearly is to ensure speedy resolution of disputes between the employer and the workman and making the High Court the final arbiter. These objects will not be achieved if the court were to allow any departure from the prescribed procedure. It will defeat the intention of Parliament and render s. 33A of the IRA completely redundant. Bearing in mind Parliament does not legislate in vain, full effect must be given to this provision. It is meant to be complied with and the aggrieved party has no right to ignore it. The court's duty is to enforce it.

[20] In *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997 Edgar Joseph Jr FCJ speaking for the Federal Court said at p. 1019:

> It is a maxim of the Law that the duty of the Courts is merely to give effect to the will of Parliament as expressed in the Law.

[21] In the then Supreme Court case of *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79 Seah SCJ said the following:

> It must always be borne in mind that we are Judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a Court to proceed in a particular course of administrating justice, was one of substance and not merely of form. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The Court has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. It seems to us to be unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature. (See Lord Chelmsford in *R v. Hughes* and Lord Macnaghten in *Vacher & Sons v. London Society of Compositors*).

[22] Section 17A of the Interpretation Acts 1948 and 1967 is also relevant. It reads as follows:

> 17A. In the interpretation of a provision of an Act, a **construction that would promote the purpose or object underlying the Act** (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. (emphasis added)

[23] The IRA is a special law enacted specially to regulate industrial relations. Part VII specifically deals with the procedure for resolving disputes between the employer and the workman. Being a special statute enacted for a special purpose the IRA must prevail over all other statutes of general application and that includes the RHC and the Courts of Judicature Act 1964 (which confers on the High Court the additional power to issue the prerogative writ of *certiorari*). This is trite principle, cast in stone by the maxim *generalia specialibus non derogant*.

[24] It must be emphasized that the issue is not whether the decision of the Industrial Court is subject to judicial review. It is settled law that the decision of an inferior tribunal, including the Industrial Court is liable to be quashed if an error of law had been committed in the decision-making process. The issue is whether the applicant can disregard the procedure prescribed by the IRA in challenging the Industrial Court award.

[25] In my judgment since the mode for challenging the award is prescribed by law, ie, by s. 33A of the IRA, the challenge must be made by this mode and no other mode. The procedure under O. 53 of the RHC is only permissible if the IRA is silent on the procedure for challenging the award.

[26] There is a time frame for filing the application for reference under s. 33A(1) of the IRA. If the aggrieved party fails to make the application within the time prescribed by s. 33A(3) he must be taken to have forfeited his right to challenge the award.

Judicial Review Causes Delay

[27] There can be no argument that proceedings by way of judicial review delays the dispute resolution process because of the right of appeal to the Court of Appeal and a further prospect of appeal to the Federal Court with leave of the Federal Court. The many cases that have gone to the Court of Appeal and the Federal Court is testimony to this fact.

[28] *R. Rama Chandran* is but one good example of how the review process could result in grave injustice to the complainant. In that case it took almost seven years to dispose of the workman's representation. The case had gone through the Industrial Court, the High Court and the Court of Appeal before the questions of law were finally resolved in favour of the complainant by the Federal Court. In view of the inordinate delay in the disposal of the complainant's representation, the Federal Court instead of remitting the case back to the Industrial Court for the Industrial Court to determine whether the complainant had been dismissed with just cause or excuse, took it upon itself to make a finding that the complainant had been dismissed without just cause or excuse.

[29] Had the Federal Court remitted the case back to the Industrial Court for decision the cycle of injustice to the complainant would have been complete. Eusoff Chin CJ summed it up when he said that to do so "will certainly involve continued and prolonged litigation which will do great harm and injustice to the complainant, and were he to die, his claim will abate … and this will result in his family suffering grave injustice."

High Court To Be Last Stop

[30] It is perplexing why the reference procedure under s. 33A of the IRA in many cases had given way to the review procedure under O. 53 of the RHC. I cannot help thinking that the real reason is to circumvent s. 33A(7) of the IRA which makes it clear as daylight that the High Court is the last stop for resolving disputes between the employer and the workman, in contrast to the review procedure under O. 53 of the RHC where r. 9 expressly permits the losing party to appeal to the Court of Appeal.

[31] The strong language used in s. 33A(7) and the absence of any appeal provision in the IRA reflects Parliament's intention not to allow the dispute resolutions to go beyond the High Court. Order 53 r. 9 of the RHC directly contradicts this Legislative intent. To allow the aggrieved party to take advantage of the review process under the RHC leads to an absurd situation whereby a case originating from the Subordinate Court can only be litigated up to the Court of Appeal, whereas a case originating from the Industrial Court could go right up to the apex court simply because the aggrieved party chose not to comply with the procedure prescribed by the IRA. This is a blatant abuse of process and should not be condoned.

[32] To avoid this absurdity and to promote the spirit and objectives of the IRA the aggrieved party must not be allowed to circumvent s. 33A(7) of the IRA. Although s. 33A(7) is an ouster clause the decision of the court pursuant to that provision is not subject to judicial review as the High Court is not an inferior tribunal and therefore unaffected by the principle laid down in *Syarikat Kenderaan Melayu Kelantan Bhd*. Judicial review is only available against the decisions of public authorities which the High Court is not. This is clearly provided by O. 53 r. 2(4) of the RHC which reads:

> Any person who is adversely affected by the **decision of any public authority** shall be entitled to make the application. (emphasis added)

[33] In any case it is absurd to suggest that the decision of the High Court, the very court vested with the power to issue the writ of *certiorari*, is liable to be quashed by another court of coordinate jurisdiction by way of judicial review.

Unfair Advantage

[34] In a legal battle between the employer and the workman it is usually the employer who takes the high ground due to his financial capacity and therefore the stamina to wear down the workman through the lengthy and costly court process. The employer's readiness to pursue every avenue open to him to win the case does not favour the workman at all. It is an unequal legal battle. As Eusoff Chin CJ succinctly said in *R. Rama Chandran*:

> Employers can certainly afford to employ a number of lawyers and prolong litigation and thereby tiring out the workers. The poor workman can ill afford a lawyer or prolong litigation because this will lead to immense hardship, suffering and exhorbitant expenses.

[35] This is not to say that the IRA is enacted only for the purpose of protecting the workman's interest. The statute is to protect the interest of both. But the simple truth is that proceedings by way of judicial review prolongs the dispute resolution and leans too much in favour of the employer, contrary to the spirit and object of the IRA. The court must put a stop to this untenable situation by not allowing the aggrieved party to hijack the review procedure under O. 53 of the RHC and taking the court for a long ride.

Industrial Court Made Party To Action

[36] Proceedings by way of judicial review presents another peculiar problem. In a reference under s. 33A of the IRA the Industrial Court is not a party to the action. Its role is merely to refer the questions of law to the High Court for determination if it decides to allow the application for reference. This is not so in a judicial review application. Order 53 rr. 2 (1) and 4(1) of the RHC requires the application to be made in Form 111A (leave stage) and Form 111B (application proper). Order 53 r. 4(2) further requires a copy of the statement and all affidavits in support to be served on all persons directly affected by the application not later than 14 days before the date of hearing. Which means the Industrial Court has to be made a party to the action. This is clearly against the spirit of s. 24(2) of the IRA which provides immunity to members of the Industrial Court in the following terms:

A Notwithstanding anything to the contrary in any written law, no member of the Court shall be compelled by any court to appear as a witness or party in any proceeding before that Court in relation to any act, matter or thing performed as a member of the Court under this Act.

B **[37]** Although the immunity relates to proceedings in the Industrial Court it reflects Parliament's intention not to allow the Industrial Court to be dragged into any proceeding involving its members. If it is prohibited in the Industrial Court, a *fortiori* it cannot be allowed in the High Court.

C

[38] In the affidavit in support of the application the applicant will invariably attack the manner the Industrial Court arrived at its decision. The affidavit in support in the present case is no different. Among the applicant's complaints against the Industrial Court
D Chairman are the following:

(a) That he had acted in excess of his jurisdiction.

(b) That he had contravened s. 30(5) of the IRA.

E (c) That he took into account irrelevant matters.

(d) That he applied the wrong test in dismissal cases.

(e) That he applied the wrong standard of proof.

F **[39]** Clearly these are points of law that could have been brought by way of reference under s. 33A(1) of the IRA. Why the affidavit contains mostly averments on legal points when they are supposed to affirm facts is hard to comprehend. By making the numerous assertions against the Industrial Court Chairman in the affidavit in
G support the applicant is putting the Chairman in a catch - 22 situation. Is he supposed to descend into the arena by filing an affidavit in opposition, given the rule that failure to oppose means acceptance of the positive assertions? Or is he supposed to ignore the allegations against him and risk argument that he accepts the
H assertions as true?

[40] In a reference under s. 33A of the IRA he is spared the embarrassment as no allegation in the form of affidavit evidence is filed against any member of the Industrial Court in such
I proceeding. In fact the reference hearing will take the form of an ordinary appeal from the decisions of the subordinate courts except that only points of law are involved.

[41] The dilemma faced by the Chairman, in theory at least is compounded by the fact that the Attorney General in the present case decided not to represent the Industrial Court. This was made clear by the Senior Federal Counsel at the commencement of the hearing. No reason was given for the decision. This leaves the Industrial Court without any legal representation although named as the 1st respondent. Of course in practice the Chairman or any member of the Industrial Court does not get involved in the proceedings but strictly speaking this does not free the Industrial Court from all the consequences flowing from being made a party to the action.

[42] The embarrassment caused to the Industrial Court is reason enough in my view to hold why judicial review is not the proper mode for challenging the decision of the Industrial Court. It is no answer to this anomalous situation for counsel to say that it is up to the Industrial Court to decide how best to defend itself. What the applicant is doing is no different from naming the Magistrates Court as a party in a judicial review application to quash its decision without going through the appeal procedure prescribed by either the Criminal Procedure Code or the Subordinate Courts Rules. If that is wrong, it cannot be right for the applicant to disregard, sidestep and bypass the procedure prescribed by the IRA.

Conclusion

[43] For all the above reasons I found merit in the objection raised by the 2nd respondent. The preliminary objection was accordingly sustained and the applicant's application for judicial review dismissed with costs.